U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: 5-24-01

Case No.: **1998-INA-00108**
CO No.: **P95-CA-34882/sj**

In the Matter of:

Gary and Victoria Davis
Employer,

on behalf of:

Catherine Premathillaka Wickramage Karunaratne
Alien.

Appearance: Dan E. Korenberg
for Employer and Alien

Certifying Officer: Rebecca Marsh Day
San Francisco, California

Before: Vittone, Burke, and Chapman
Administrative Law Judges

LINDA CHAPMAN
Administrative Law Judge

Decision and Order Affirming Denial of Certification

This case arose from an application for labor certification on behalf of Alien Catherine Premathillaka Wickramage Karunaratne ("Alien") filed by Gary and Victoria Davis ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied

the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Statement of the Case

On October 12, 1994, the Employer, Gary and Victoria Davis, filed an Application for Alien Employment Certification. The position was "Tutor," and the duties were described as follows:

> Teach employer's children reading, writing, arithmetic, geography, history, spelling, english [sic], social sciences and other subjects. Develop curriculum in each separate subject to suit children's age and needs. Develop and administer tests, pop quizes [sic], exams, homework, etc. in order to monitor the development of the students. Keep records.

(AF 49-51, 95-98). A period of recruitment followed, and one person applied. She later declined consideration, citing the wages offered (AF 53, 58-59).

On March 21, 1996, Acting Certifying Officer (CO) Rebecca Marsh Day issued a Notice of Findings (NOF) indicating her intent to deny the application. In the attachment to the NOF, the CO noted that 20 C.F.R. § 656.3 required that employment be full-time, and that the Department's position was that it was "infeasible that a full-time, 40-hour per week tutorial position exists." The CO observed that after the implementation of the Immigration Act of 1990 (IMMACT 1990), her office noted a decline in applications for unskilled workers, and an increase in the number of applications for skilled workers. The CO noted that the position as described in the ETA 750A most closely resembled the Dictionary of Occupational Titles (DOT) position "tutor (education)," and that the DOT position "children's monitor (domestic service)" was an unskilled houseworker position, for which visas are not available. The CO stated:

> It appears implausible that the actual number of job opportunities for skilled domestic workers has increased since 1991, since relatively few households have either the resources or the need for full-time skilled domestic staff. It appears that employers are submitting applications for unskilled domestic job opportunities (i.e., houseworker general, child monitor), but in completing the ETA 750, employers have inflated the job duties and requirements to qualify the alien workers for immediate visas as skilled workers under the provisions of IMMACT 1990.

The CO required that the Employer "establish conclusively that the job opportunity described on the ETA 750A does in fact exist and that the employer has a job opportunity for a **skilled** worker." In order for the Employer to comply with the requirements of 20 C.F.R. 656.20 (c) (8), the CO requested additional information to show that the position was a "full-time job opportunity that [was] clearly open to U.S. workers." Toward that end, she enumerated ten questions which the Employer was required to address on rebuttal. These questions addressed the duties to be performed by the alien; information regarding the children's ages, schedules, care, and other activities; the process used to determine the number of hours for tutoring each child, including any expert opinions on the necessity

and usefulness of that amount of tutoring; the subjects and schedules for the tutoring, including lesson plans and textbooks used and information showing these subjects were related to the children's school curriculum; amounts and kinds of tutoring provided for the children in the past, if any; and the anticipated age at which the tutoring would end (AF 43-47).

In a letter dated April 18, 1996, the Employers presented their rebuttal and supporting documentation. The Employers disputed the CO's statement that tutor positions are not normally full time, noting that the CO cited no authority for this statement. The Employers further alleged that the CO did not explain her reasons for finding that the Employers' household circumstances could not support a full-time tutor. The Employers also alleged that the CO had failed to substantiate her belief that the tutor position was really that of a houseworker, arguing that the Alien's qualifications were more suited to the tutor position than to a houseworker position. The Employers took issue with the CO's questioning of the propriety of the contemplated tutoring and its potentially "harmful" effects on their children.

The Employers provided responses to the CO's questions. The Employers have two children, ages seven and ten, who attend school from 8:15 am until 2:30 pm Monday through Friday. Each of the children would be tutored three hours a day from Monday through Friday, and five hours on Saturday. The Alien's duties would be limited to tutoring the children. On weekdays, the Alien would tutor the seven-year-old from 3:00 pm to 6:00 pm, during which time the ten year old would be in the same house with the Alien but would not be required to be cared for. The children were tutored by the Employers themselves, but the Employers' work schedules did not permit them to adequately assist their children; therefore, they were seeking a tutor to meet those needs.

The Employers stated that they did not feel that 20 hours per week of tutoring for each child was excessive, and that the children would have adequate time for independent activities, including non-academic activities at school and time at home to relax. The Employers provided a schedule for the tutoring with hourly breakdowns by subject areas, totaling 20 hours a week per child. The Employers took issue with the CO's request that the Employers submit documentation from experts that the combined effect of school and tutoring would not be harmful to the children. They cited (but did not provide) a study by a Professor Benjamin Bloom, in which he found that tutored students learned more than 98% of students taking regular classes and that 90% of tutored students reached academic levels that only 20% of non-tutored students reach. The Employers also referred to studies showing a relationship between television watching and a propensity for violence, although the identity of these studies was not provided. The Employers noted that they intended for the children's tutoring to last until they reached the age of 14. With the rebuttal letters, the Employers included "lesson plans" for the children (consisting of a list of books and subjects to be "presented" to the children), copies of their report cards, copies of the Alien's college degrees, and a copy of the NOF (AF 20-42).

On June 7, 1996, the CO issued a Final Determination (FD), in which she declined to grant certification. The CO again cited the regulatory definition of employment found at 20 C.F.R. § 656.3

for the proposition that the job must be full-time. The CO noted that while the Employers were correct that the CO's reasons for denial must be specific to the Employer, her discussion of IMMACT was intended to explain why the Department required documentation that the job was full-time in nature. The CO concluded that "it is clear that this position is created for the alien." She reasoned that the Employer had never previously employed a full or part-time tutor and had not shown "any experience or research and planning that would support the chosen number of hours of tutoring." The Employers did not explain why they felt that the children could benefit from 20 hours a week of tutoring, and did not provide any research or evidence that 20 hours of tutoring a week per child would be "beneficial." The Employers did not try to arrange other tutorial services. The CO noted that "[w]ithout a sound basis for selecting 20 hours per week per child, it is difficult to [sic] not to conclude that the petitioner chose the number of hours in order to file a labor certification application."

The CO further noted that the Employers did not include lesson plans showing "what a tutor will do to accomplish the goals and how long it takes." The Employer required teaching experience, but did not appear to find it important that the Alien's teaching experience was at a college rather than at the elementary or secondary school levels. These factors led the CO to conclude that the Employers did not have expertise in the tutoring occupation and were in fact customers of services. She found that the job opportunity appeared to resemble more closely domestic service or household worker. She also observed that in the schedule given in the answer to question 7 on rebuttal, the Employer accounted for only 38 hours and that math, art, and didactic recreation were subjects not included in the ETA 750 Part A. Moreover, she did not consider didactic recreation to be an academic subject. She finally concluded that "the failure to try other tutoring alternatives and failure to research the beneficial number of tutoring hours indicates this position was created for the alien. The documentation does not clearly support a finding that a full-time permanent job currently exists or that the job is clearly open to U.S. workers, 656.20 (c) (8)" (AF 17-19).

Under cover letter of July 8, 1996, the Employers submitted a Motion to Reconsider and in the Alternative Request for Review of Denial of Alien Labor Certification (AF 3-12). The Employers alleged that the CO erred in finding that the position was not an existing full-time permanent job. They questioned the CO's determination that the they chose the number of hours of employment in order to be able to file for labor certification, and argued that the CO could not rely on the generalization that tutors are not normally employed full-time in private households. They also took issue with the CO's NOF finding that the Employers' household circumstances could not support a full-time tutor. The Employers further alleged that the CO erred in discussing in the NOF the impact of IMMACT on the number of applications for skilled domestic workers, and the CO's assertion that the position was really one for a houseworker. The Employers also noted that the CO erred in considering the potential effects of the amount of tutoring on the children. The Employers alleged that the CO ignored the information contained in their rebuttal letter when she determined that the position was really one for a houseworker, based on the lack of knowledge about the requirements for tutoring positions and their failure to specify elementary or secondary teaching experience. The Employers also noted that the 38 hour total of tutoring time was based on a typographical error, and that the schedule clearly shows 40

hours of tutoring per week. The Employer further noted that the subjects noted on rebuttal were not inconsistent with the ETA 750, Part A and that Didactic Recreation was "vital to the development of verbal reasoning and skills that enable a pupil to successfully deal with and solve academic problems that arise throughout the curriculum." The Employers also took issue with the CO's reliance on the fact that they did not try other tutoring alternatives and did not research the beneficial number of tutoring hours (AF 4-12).

On June 16, 1997, the CO denied the Employers' motion and indicated that the case would be forwarded to the Board for review (AF 13). The case was docketed by the Board on November 12, 1997.

Discussion

In this case, the CO concluded that the Employers had failed to show that a full-time, permanent job clearly open to U.S. workers existed. 20 C.F.R. § 656.3 requires that employment be of a permanent, full-time nature, and 20 C.F.R. § 656.20(c)(8) requires that jobs be clearly open to qualified U.S. workers. The over-reaching reason for the CO's denial of certification was that the position had been created for the Alien.

The Board has found that in order to satisfy the definition of employment found in 20 C.F.R. § 656.3, the Employer must demonstrate that the position is "permanent versus temporary and full-time versus part-time." *Daisy Schimoler*, 1997-INA-00218 (March 3, 1999) (en banc). Certification may not be denied pursuant to this provision if "the employer is offering a work week with hours customary for a full-time employee in the industry." *Id.* However, if the employee's duties would not keep him gainfully employed for the substantial part of his work day, this fact may be relevant to the determination of whether a *bona fide* job opportunity exists. *Id.* "If an employer appears to be mischaracterizing a job or to have created the job for purpose of assisting the alien's immigration, the CO may properly question the application under section 656.20(c)(8)." *Id.* Thus, in the instant matter, while the CO could not have denied certification based on her belief that full-time employment was unnecessary, she could, and did, take into account this finding in her determination under 656.20(c)(8).

In *Carlos Uy III*, 1997-INA-00304 (March 3, 1999) (*en banc*), the Board noted that 20 C.F.R. 656.20 (c) (8) was the correct regulatory provision to invoke when the CO believes that the job has been mischaracterized. *Id.* However, when a CO invokes this provision to deny certification, "administrative due process mandates that the CO specify precisely why the application does not appear to state a *bona fide* job opportunity." *Id.* Although the Board ultimately concluded that it could not determine the CO's basis for denying certification, the Board discussed the factors to be taken into account when applying the totality of the circumstances test in determining the existence of a *bona fide* job opportunity. *Id.* The Board noted that:

The heart of the totality of the circumstances analysis is whether the factual circumstances

> establish the credibility of the position. In applying the totality of the circumstances test, the CO's focus should be on such factors as whether the employer has a motive to misdescribe a position; what reasons are present for believing or doubting the employer's veracity or the accuracy of the employer's assertions; and whether the employer's statements are supported by independent verification.

Id.

In the instant matter, the CO's NOF put the Employers on notice that the CO did not believe that a full time job existed, or that the job was clearly open to qualified U.S. workers. The questions that the CO requested the Employers answer on rebuttal were similar in nature to the factors enumerated in *Carlos Uy* in analyzing the totality of the circumstances regarding the *bona fide* nature of the job. In the FD, the CO noted that the Employers had not employed a tutor in the past, either part-time or full-time, and had tutored the children themselves. They had no training or experience, nor did they proffer any documentation to support their determination that 20 hours a week per child (which happens to add up to a 40 hour, full time work week) was an appropriate amount of time for tutoring, in addition to regular school attendance.[1] The Employers made no attempt to hire a tutor, other than filing for labor certification. The Employers provided subjects and daily hours for the tutoring, but they did not provide lesson plans. The CO took issue with the number of hours and course work included in the schedule.[2] Also, the Alien's teaching experience was at the collegiate level, and the Employers did not require that the tutor have elementary or secondary education experience.

The CO specifically did not take issue with the Employer's desire to enhance their children's education by hiring a tutor. But she concluded, based on all of these factors, that the position was created for the Alien, and the documentation did not clearly support a finding that a full time job currently existed, or that the job was clearly open to qualified U.S. workers as required by 20 C.F.R. 656.20(c)(8). The burden of proof for obtaining labor certification lies with the Employers under § 656.2(b). Viewing the evidence as a whole, it is clear that the Employers failed to meet that burden. The CO's reasoning clearly shows that she conducted a totality of the circumstances analysis in reaching her conclusions. The CO's findings clearly show that she was correct in determining that certification should be denied.

ORDER

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[1] The fact that the ten year old would be home for three hours each day unattended, while the seven year old was tutored, as well as the fact that there was no time allotted for extracurricular or sports activities, supports the CO's conclusion that the position is more akin to that of domestic worker.

[2]The Employers correctly note that a tally of the hours allotted to each child for each subject does result in a total of 40 hours per week.

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Linda S. Chapman
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.